BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HILLARY NEWELL	)	
Claimant	)	
V.	)	
	)	
SCHWAN'S GLOBAL SUPPLY	)	
CHAIN, INC.	)	Docket No. 1,065,159
Respondent	)	
AND	)	
	)	
HARTFORD INSURANCE COMPANY	)	
OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Claimant, through Melinda G. Young, of Hutchinson, requested review of Special Administrative Law Judge (SALJ) C. Stanley Nelson's March 3, 2015 Award. Jared T. Hiatt, of Salina, appeared for respondent and insurance carrier (respondent). The Board heard oral argument on August 11, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, claimant acknowledged having no argument to dispute the SALJ's calculation of her average weekly wage. The parties agreed the exhibits to claimant's evidentiary deposition should be considered as evidence even though there was no indication they were offered into evidence.

ISSUES

The judge awarded claimant a 9% functional impairment to the left arm. The judge denied claimant's request for future medical treatment after finding she failed to prove additional medical treatment would be necessary after she reached maximum medical improvement (MMI).

Claimant requests the Award be modified, arguing she is entitled to future medical treatment because her left wrist is worse than before and two physicians opined that if her symptoms worsened, she would need wrist reconstruction. Respondent maintains the Award should be affirmed. According to respondent, claimant does not need future medical treatment and any evidence to the contrary is speculative and based on mere possibilities, not medical probability.

The only issue for review concerns whether claimant is entitled to future medical treatment.

FINDINGS OF FACT

Claimant, 28 years old, began working for respondent through a temporary agency in August 2011 and was hired as respondent's employee in January 2012.

On March 20, 2012, claimant felt a pop and burning sensation in her left wrist while dumping a trash can at work. She reported the incident to her supervisor and saw the company nurse, who applied ice to her wrist. Claimant continued to work her regular duties, but returned to the nurse each day to have ice applied. She was referred to James Shafer, M.D., the company doctor, who saw her on March 28, 2012. Over the course of treatment through May 15, 2012, Dr. Shafer restricted claimant to light duty work, restricted claimant against repetitive work with her left hand and eventually referred her to Gary Harbin, M.D., an orthopedic surgeon.

Claimant voluntarily left respondent's employment on June 1, 2012, and went to work for another employer.

Claimant first saw Dr. Harbin on June 12, 2012. Conservative treatment did not provide relief. Dr. Harbin performed a left wrist DeQuervain's release on July 17, 2012. Claimant testified the surgery helped because she did not have constant pain when using her hand thereafter. Dr. Harbin last evaluated claimant on January 7, 2013. She complained about her wrist popping when lifting an 18-pack of juice. Claimant reported minimal problems and her pain was gone, but she had minimal tenderness at her incisional area and a mild subluxation tendency. Dr. Harbin released claimant to full duty and noted she could return to his clinic on an as needed basis. The doctor rated claimant as having a 3% left upper extremity impairment.

On July 16, 2013, at her attorney's request, claimant saw George G. Fluter, M.D., who is board certified in physical medicine and rehabilitation. About 85% of Dr. Fluter's work consists of performing independent medical examinations with the vast majority being done at the request of claimants' attorneys.

Dr. Fluter diagnosed claimant as having work-related left hand and wrist pain that required DeQuervain's surgery. Dr. Fluter noted claimant took over-the-counter Tylenol and ibuprofen "when needed."[1] Dr. Fluter recommended medication (non-steroidal anti-inflammatories, analgesics and possibly anticonvulsants, antidepressants, antispasmodics and/or sleep aids), imaging studies, EMG and orthopedic reevaluation and/or a second opinion regarding a nodular lesion on claimant's left wrist. Dr. Fluter assigned claimant an 11% functional impairment to the left upper extremity, but he later testified claimant only had a 9% impairment.

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[1] Fluter Depo., Ex. 2 at 3.

Also after he issued his report, Dr. Fluter testified claimant will "more likely than not" need future medical treatment – continued medications and possible surgery.[2] On cross-examination, Dr. Fluter stated he did not know what medications claimant was taking and was "not sure" if claimant needed more physical therapy.[3]

On March 19, 2014, at respondent's request, claimant saw E. Bruce Toby, M.D, a board certified orthopedic surgeon specializing in hand surgery. Dr. Toby diagnosed claimant with status post DeQuervain's release with persistent symptoms. Dr. Toby was authorized to provide treatment, but he only recommended observation after noting claimant's symptoms were "relatively minor."[4] Dr. Toby testified claimant may need some over-the-counter medications, but did not need additional treatment or surgery, unless her symptoms worsened, in which case she would be a candidate for wrist arthroscopy.[5]

In a June 6, 2014 letter to respondent's attorney, Dr. Toby stated:

> The patient has persistent subjective symptoms but has a minimum of objective findings. As I stated in my office note, I would not recommend any type of additional surgery.
>
> . . . I would think it would be more probable that she would not require future medical treatment. This would be as a result of lifting a trash can, an injury that occurred on 03/20/2012. Again, I do not think she would need future medical treatment for the stated injury.[6]

Subsequently, claimant testified her wrist is "getting worse" and she experiences burning, popping and pain when using her wrist, including lifting, pushing and pulling.[7] She noted the inability to hold a teacup for more than about 90 seconds and spontaneously dropping things. Sometimes, she has no pain, but does have pain about every other day. When asked if she takes any medication for her symptoms, claimant testified:

> No, it's just a brief pain. It's any time that, you know, I lift, it pops and burns. As soon as I set it down it aches for a few minutes afterwards, but then it's gone. So it's nothing that really requires a long term pain medication.[8]

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[2] *Id*. at 14-16.

[3] *Id*. at 18.

[4] Toby Depo., Resp. Ex. 3 at 2.

[5] *Id*. at 10-11, 13-14, Resp. Ex. 3 at 2.

[6] *Id*., Resp. Ex. 5.

[7] R.H. Trans. at 13, 15.

[8] *Id*. at 15.

Claimant is currently training to become a paramedic and wants to be a flight medic. She testified future medical treatment is very important because these positions require use of her arms. When asked whether there was anything specific she was asking for in terms of future medical, claimant testified:

> I am not sure exactly what it is that I need to get to the point that I was before the injury. I need to be able to lift and push and pull, and I can't do that right now.[9]

Pages seven and eight of the SALJ's March 3, 2015 Award state, in part:

> K.S.A. 44-510h(e) provides in essence that after the employee reaches maximum medical improvement, it is presumed that the employer's obligation to provide medical treatment shall terminate; but that such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary.
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> . . .
>
> The Court finds that Dr. Fluter's initial statement that it is more likely than not that Claimant would need future medical treatment and to continue to take anti-inflammatories and analgesics was refuted: by his statement "I'm not sure what she would need"; by his acknowledgment that he did not know what medications she may or may not be taking; and by Claimant's testimony at Regular Hearing that she doesn't take anything for pain.
>
> Dr. Toby, board certified since 1989 in orthopedic surgery and hand surgery, testified: that his clinical impression was that Claimant's persistent symptoms were probably due to the fact that her tendons still did some subluxing back and forth; that he did not feel that there was any significant evidence by exam, particularly because two years had elapsed of any type of major ligamentous instability; that though she had pain there were no surgical options that made sense; that based on his one-time visit and review of the x-rays was that it was more probable that she would not need additional medical treatment; that she may need some over the counter medications; and that if Claimant's symptoms should worsen in the future she would be a candidate for wrist arthroscopy which would be a reconstructive procedure and typically those are partial wrist fusions.
>
> The Court finds that when Claimant reached maximum medical improvement on 1/7/13 a presumption arose that Respondent's obligation to provide medical treatment terminated; and that Claimant has failed to provide medical evidence that it is more probably true than not that additional medical treatment will be necessary.

Thereafter, claimant filed an appeal.

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[9] Claimant Depo. at 41.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

To overcome the presumption in K.S.A. 2011 Supp. 44-510h(e), claimant must prove it is more probably true than not true that she will need medical treatment after she reached maximum medical improvement, as based on medical evidence. Over-the-counter medication is statutorily excluded as future medical treatment.

Claimant's testimony that she wants future medical left open is not medical evidence. Only the medical experts provided medical evidence:

- Dr. Harbin indicated claimant had minimal symptoms. Dr. Harbin did not indicate claimant would need additional medical treatment, but noted she could return to him as needed. It does not appear claimant has returned to Dr. Harbin over the last two and one-half years.

- Dr. Fluter recommended a wide variety of treatment options and testified claimant will likely need medical treatment in the future.

- Dr. Toby testified claimant's "relatively minor" symptoms warranted observation and over-the-counter medications from time to time, but she was not in need of additional medical treatment. However, Dr. Toby noted that if claimant's symptoms were to worsen, she would be a candidate for wrist arthroscopy.

Dr. Toby's opinion regarding claimant's future medical needs hinged, or was contingent, on whether she worsened after the one time she saw him. Claimant testified her symptoms worsened. Thus, the contingency was fulfilled. Based on Dr. Toby's opinion, claimant is a candidate for wrist arthroscopy. She is entitled to future medical treatment.

The Board recognizes claimant sought no medical treatment subsequent to January 2013 and she currently does not even take over-the-counter medication. However, claimant's testimony is that she is worse now, struggles daily and has burning, popping and pain when using her wrist. Such testimony is not so improbable as to not be believed.[10] Additionally, claimant will still need to prove her entitlement to any additional medical treatment upon proper application.

CONCLUSIONS

Claimant proved entitlement to future medical treatment.

AWARD

WHEREFORE, the Board reverses the March 3, 2015 Award to the extent we find claimant is entitled to future medical treatment.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[10] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

DISSENT

The undersigned Board Members dissent. Claimant did not prove entitlement to future medical treatment.

A plain and unambiguous workers compensation statute should be interpreted based on its express language without speculation on legislative intent or judicial modification.[11]

K.S.A. 2011 Supp. 44-510h(e) is plain and unambiguous. The statute is clear that absent medical evidence to the contrary, there is a rebuttable presumption medical treatment shall terminate upon the employee reaching MMI. The medical evidence must establish it is more probably true than not that additional medical treatment will be necessary after the claimant reached MMI.

The most credible medical witness, Dr. Toby, a chair and professor of the Kansas Medical Center Department of Orthopedic Surgery, clearly indicated claimant did not require future medical treatment, including surgery. Dr. Toby minimized the objective nature of claimant's complaints and focused on her subjective complaints. Dr. Toby's acknowledgment that claimant would be a candidate for future medical treatment – if she worsened – is not based on his examination of claimant or medical probability. Moreover, such conclusion rests on a contingency that has not occurred, at least based on consideration of all of the credible evidence.

Claimant's statement that she is worse is self-serving and against the weight of the evidence. Her purported worsening or any "necessity" for future medical treatment is undermined by:

- her testimony she only has "brief pain" which dissipates after a "few minutes,"
- her lack of *any* medical treatment over the last two and one-half years, and
- the fact she does not take any medication, even of the over-the counter variety.

Additionally, even if claimant is currently worse than before, she presented no proof her asserted worsening is due to her accidental injury.

Allowing claimant to avoid K.S.A. 2011 Supp. 44-510h(e) because she parroted Dr. Toby's testimony violates the intent of the statute.

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[11] See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

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Honorable C. Stanley Nelson